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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

ESSO STANDARD OIL COMPANY,
Petitioner,
v.
SECATORE'S, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

ESSO STANDARD OIL COMPANY,
Petitioner,
v.
SECATORE'S, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on May 2, 1957.

Opinions Below.

The opinion of the District Court (Wyzanski, J.) is printed in Appendix B hereto (pp. 31-33, *infra*), appears in the record filed with this petition (R. 121-124) and is reported in 1956 CCH Trade Cas., ¶ 68,547. The majority and concurring opinions of the Court of Appeals of May 2, 1957, printed in Appendix A hereto (pp. 14-25, *infra*), are reported in CCH Trade Reg. Rep. Current Decisions, ¶ 68,095.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 2, 1957 (App. A., p. 14, *infra*). Rehearing was denied on June 14, 1957, (App. A., p. 26, *infra*).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The McGuire Act exempts from the anti-trust laws all fair trade "contracts or agreements" valid under state law (paragraph (2)) and "enforcement," against non-signers, of rights created by state law (paragraph (3)). Paragraph (5) provides that "nothing contained in *paragraph (2)* of this subsection shall make lawful contracts or agreements . . . between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." (Emphasis added.) The questions presented by this appeal are—

1. Whether paragraph (5) of the McGuire Act may be judicially interpreted so as to include a denial of the

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* The petition for rehearing was limited to securing leave to file a supplemental record appendix to petitioner's brief before the Court of Appeals to establish on the record that petitioner had, contrary to statements in the original majority and concurring opinions (App. A., pp. 22, 25, *infra*), presented to the District Court an application for a partial injunction, and for an amendment of the opinions to reflect the fact so established. The court, on the petition, granted permission to file the supplemental record appendix; the majority did not formally amend their original opinion (App. A., pp. 26-28, *infra*); the concurring judge (Aldrich, D.J.) withdrew his prior opinion of May 2, 1957 (App. A., pp. 24-25, *infra*), and substituted a new "concurring" opinion (App. A., pp. 28-30, *infra*).

exemption afforded by *paragraph* (3) and thus preclude enforcement of rights created by state law.

2. Whether, if the preceding question be answered in the affirmative, a producer-wholesaler of a trade-marked commodity may be denied the exemption afforded by paragraph (3) of the McGuire Act with respect to enforcement against a non-signer retailer because there is a class of persons who might elect to purchase either from such producer-wholesaler, under wholesale terms and conditions, or from such retailer, under retail terms and conditions.

3. Whether, if the preceding question be answered in the affirmative, such producer-wholesaler may be denied the exemption afforded by paragraph (3) to enforce its fair trade prices with respect to the greater and separable part of such retailer's business as to which there is concededly no competition between the parties.

Statute Involved.

Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of July 14, 1952, 66 Stat. 632, commonly known as the McGuire "Fair Trade" Amendment, 15 U.S.C. § 45 (a).

See Appendix C (pp. 34-36, *infra*) for the text of this statute.

Statement of the Case.

The petitioner's complaint was brought under the diversity jurisdiction to enjoin respondent, a "non-signer," from selling, in violation of the Massachusetts Fair Trade Act,* the petitioner's trade-marked "Esso" and "Esso Extra" gasolines for less than the minimum retail prices estab-

* Massachusetts General Laws (Ter. Ed.) c. 93, §§ 14A-C.

lished by agreements, valid under said Act, between petitioner and certain of its retailers.*

The petitioner, a Delaware corporation, is engaged in the refining and wholesale marketing of petroleum products, and does a dollar volume in Massachusetts in its trademarked gasolines which amounted in 1955 to over $32,000,000 (R. 24, 93). Sales to approximately 984 retail service station dealers constitute about 90% of such volume, with the remainder being sales to about 455 so-called commercial accounts (R. 94.)† A commercial account is a business concern which has its own gasoline storage tanks and pumps and buys gasoline in tank-wagon quantities. The respondent, a Massachusetts corporation, is a retail service station dealer; all of its sales involve the dispensing of gasoline from the conventional pump into the fuel tanks of the consuming motor vehicles which come to its premises, the size of the transaction being limited by the capacity of such fuel tanks.‡ The petitioner makes no sales of this sort whatsoever, all of its deliveries being in large quantities into the storage tanks or tank wagons of its customers (R. 44).

The respondent had about 45 customers defined by it as "fleet accounts" (R. 97), on the basis of aggregate annual purchases for their various vehicles in excess of 5000

*The basis of a *prima facie* case within the Massachusetts Act (and the McGuire Act exemption) was virtually stipulated (R. 18-23), viz., that petitioner has long marketed gasoline under, and had a valuable good will in, the trade names "Esso" and "Esso Extra"; that such gasoline is sold in free, fair and open competition with gasolines produced by others; the establishment of minimum retail fair trade prices for petitioner's gasolines by agreements with other retailers; notice to respondent and the subsequent advertisement for sale and sales by the latter at below the posted prices.

†Amounting, in 1955, to slightly less than $3,350,000 (R. 103).

‡The average being 7½ gallons per sale, with a maximum in the case of long-haul trucks of 120 gallons (R. 85).

gallons a year (ranging upward to a maximum in one case of 42,000 gallons). Of petitioner's business with its commercial accounts, about one-third involved sales to accounts purchasing less than 50,000 gallons annually (R. 103-104), all of which were bulk tank wagon deliveries.

The District Court, in an opinion of October 3, 1956 (R. 65-72), initially rejected a defense that the parties were in competition with each other within the language of the proviso in paragraph (5) of the McGuire Act, and certain other defenses,* and granted a preliminary injunction requiring the maintenance by respondent of posted retail fair trade prices. Subsequently, after further development of the aforementioned evidence as to the existence of a class of respondent's customers comparable in total yearly consumption to some of petitioner's trade, the District Court ruled that the parties were "in potential competition" (R. 123) (*i.e.*, within paragraph (5)) and vacated the injunction. At this time (R. 127-132) counsel for petitioner urged unsuccessfully that the proviso did not apply as between the petitioner and a non-signer whose obligations were fixed by state law pursuant to paragraph (3) of the McGuire Act. Immediately thereafter petitioner moved in the District Court, and *pendente lite* in the Court of Appeals, for an injunction enforcing fair trade except as to sales to the fleet accounts as to which potential competition had been found; both motions were denied.

The court below affirmed the ruling of the District Court that petitioner was in potential competition with respondent (for fleet accounts) within paragraph (5) of the McGuire Act and also ruled that the Act did not contemplate or authorize fair trade enforcement even as to that separable and much greater portion of respondent's sales as to which there was no competition between the parties (p. 23, *infra*).

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* Which, since they were not reached by the Court of Appeals, do not figure, and have not been dealt with, in this petition.

Both rulings rested on the Court's interpretation of statements in the opinion in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

Reasons for Granting the Writ.

1. The interpretation of paragraph (5) of the McGuire Act reached by the court below conflicts with (*a*) the expressed intent of Congress, (*b*) the opinion of this Court in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), and (*c*) the ruling of the Supreme Judicial Court of Massachusetts in *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E. (2d) 652 (1956).

(*a*) *The conflict with the expressed intent of Congress.*

It is respectfully submitted that the Congress that enacted the McGuire Act knew precisely what it was doing. Congress enacted the McGuire Act because it did not agree with the judicial interpretation of its intent in enacting the Miller-Tydings Act contained in the *Schwegmann* opinion (*Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)).

Section 1 (the preamble) of the McGuire Act recites that its purpose is "to protect the rights of states" to enact statutes authorizing fair trade contracts binding upon nonsigners.

The only conceivable force against which such state rights needed (and apparently still need) such protection was (and is) decisions of the federal courts such as the one below. If Congress had wanted paragraph (5) of the McGuire Act to include a denial of the exemption afforded by paragraph (3), it could and would have specifically so provided. The draftsmen knew how to make such express

provision. Witness the immediately preceding paragraph (4), which expressly refers to both the validity of contracts (paragraph 2) and the enforcement of rights against non-signers (paragraph 3). "Congress thus made as plain as words can make it that"* it was omitting from paragraph (5) any denial of the exemption afforded by paragraph (3). Nor can it be said that there is no reason for this deliberate omission. Congress did not want to sanction horizontal *agreements* in restraint of trade between competitors dealing in the same or competing commodities fixing the price at which *each* would sell (*cf. United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305). But the history of this litigation manifestly demonstrates that the petitioner is not "conspiring" in restraint of trade with its non-signer retailers. Moreover, Congress certainly may safely exempt from the antitrust laws the enforcement of rights of action created by state statutes. It is respectfully submitted that it is more logical to assume that Congress has done so when it quickly enacts legislation to counteract the effect of an opinion of this Court denying such exemption (*cf. Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384) than when it fails for thirty years to enact legislation to counteract the effect of an opinion of this Court granting such exemption (*cf. Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200). It may well be that the antitrust laws should not exempt a producer from fixing its minimum retail fair trade prices so high that a non-signer retailer could not compete with it for the business of persons who might elect to purchase either from it, under wholesale terms and conditions, or from such retailer, under retail terms and conditions. But that is a question which must be resolved by Congress and not by the courts. "We think that if there are evils in

* *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 313.

this field which now warrant application to it of the antitrust laws it should be by legislation." *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356, 357.

(*b*) *The conflict with the opinion of this Court.*

The decision of the court below that the exemption afforded by paragraph (3) of the McGuire Act does not apply to fair trade enforcement between parties patently not on the same functional level because of potential competition between them for a limited class of customers conflicts in principle with the opinion of this Court in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

The McGuire Act and the Miller-Tydings Act have historically been characterized in both the relevant Congressional history and the decisions as authorizing "vertical" fair trade enforcement, *i.e.*, between the producer (wholesaler) having an interest in the good will of the trademarked product, on one hand, and a retailer on the other.

81 Cong. Record 7487, 7495-7496, 8141 (1937).
Schwegmann Brothers v. *Calvert Distillers Corp.*, 341 U.S. 384, 389.

"Vertical" fair trade enforcement is being sought in the case at bar. The fair trade agreement is between a producer-wholesaler and a retail gasoline dealer. The suit is against a non-signer, a retail dealer, for unfair competition. There is no horizontal agreement between producers, between wholesalers nor between retailers. *McKesson & Robbins* does not support, contrary to the holding of the court below, applying paragraph (5) of the McGuire Act to bar the vertical enforcement sought herein. The defendant in the *McKesson* case was a wholesaler and the condemned agreements were with other independent wholesalers. This Court based its ruling in *McKesson* on the

ground that such agreements were between contracting parties at the same horizontal functional level. While the *McKesson* opinion contained a statement to the effect that " . . . without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other" (351 U.S. at 313), this statement was clearly intended as a response to the argument of the defendant therein that it was a manufacturer as well as a wholesaler and that, when it entered into the fair trade agreements with its independent wholesalers, it did so in its role of manufacturer, not wholesaler. Read in context, the statement does not contradict the other repeated references in the opinion to the effect that a requisite of "competition" as that term is used in paragraph (5) is that the persons involved must be on the same horizontal level (351 U.S. at 312, 313, 315, 318, 319).

The critical distinction between this case and the *McKesson* case becomes evident upon analysis of the agreements involved in the two cases. Essentially, the *McKesson* situation was an agreement between two wholesalers competing with each other for the same class of customers, both agreeing to make all sales of the same quantity of materials at not less than a minimum price.* In the instant case there was no such agreement and no such competition. While the court below found that there was "potential" competition, the "potential" meant that a retail customer of the class served by the respondent, by providing himself with the necessary facilities, could become a wholesale customer of the class served by the petitioner. The con-

*While not so expressed in the case, this may be inferred from the fact that, until the *McKesson* case, it had been commonly accepted law that the manufacturer of a trade-named product who fair-traded at the wholesale level could not himself sell it at a lower price or he would be barred from enforcing the fair trade prices (see *e.g.*, *Gillette Safety Razor Co.* v. *Green* (N.Y. Sup. Ct. 1938), 167 Misc. 251, 3 N.Y.S. (2d) 882, and other cases cited in Vol. 1, CCH Trade Reg. Rep. ¶ 3452).

tracting party in this case is a retail dealer with whom petitioner as producer and wholesaler had entered into a fair trade agreement under which the *dealer* agreed to make all retail sales of petitioner's products at no less than specified minimum prices.. The validity of the fair trade agreement was not directly attacked or questioned. The petitioner, unlike *McKesson*, did not agree to make its sales at no less than certain prices, because petitioner does not sell at the retail level of competition. Nor does the fair trade agreement prohibit the contracting dealer from making wholesale sales at any prices he may choose. The price agreement in the *McKesson* situation, by its nature, was essentially bilateral price fixing. In the instant case the fair trade agreement is clearly unilateral vertical price fixing exempt under paragraphs (2) and (3) of the McGuire Act.

The court below felt constrained to rule, solely because of "the strictness" with which the Miller-Tydings and McGuire Acts were construed by this Court in the *Schwegmann Brothers* and *McKesson* cases, "that any competition for customers is an absolute bar to price maintenance agreements between the competitors" (R. 136) and that, consequently, petitioner was prohibited by the McGuire Act from having a decree framed with respect to the great bulk of respondent-retailer's business as to which there was concededly no competition with petitioner-producer-wholesaler. On this phase of the case the court below, which obviously thought that some measure of relief was otherwise appropriate (App. A., p. 23, *infra*), failed to give that relief solely because of what it inferred to be the negative attitude of this Court toward fair trade enforcement implicit in, but not expressed in, the *McKesson* and *Schwegmann* decisions. Strict construction thus becomes frustration of a declared statutory purpose. But the question of a partial injunction was not before this Court in *McKesson* and the economic facts were markedly different from those

on which petitioner here supports its request for such relief, *i.e.*, in *McKesson* the contracting parties were in competition throughout the range of their activities; here any such competitive overlap is limited and separable.*

(c) *The conflict with the ruling of the Supreme Judicial Court of Massachusetts.*

The decision of the court below conflicts with the opinion of the Supreme Judicial Court of Massachusetts in *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665, 672, 132 N.E. (2d) 652, 657. It was there held that sales to employees and to "governmental agencies or to commercial or institutional establishments buying for their own use and not for resale" did not make General Electric a competitor of the non-signer retailer defendant within the McGuire Act proviso. The court, ruling that the sales in question were "merely incidental and accessory" to the basic business of the producer, concluded that both the state Fair Trade Act and the McGuire Act prohibit only "horizontal price fixing agreements between persons at the same competitive level."

2. The issue is important and should be resolved by this Court.

As a practical matter, the decision of the court below means that it is impossible for the petitioner to avail itself

* For other lower Court decisions in conflict with the construction of *McKesson* reached in the decision below herein see *Eli Lilly & Co.* v. *Rosenblum* (N.Y. Sup. Ct., April 25, 1957), 137 N.Y. L.J. No. 80, p. 8, CCH Trade Reg. Rep. Current Decisions, ¶ 68,696; *Sun Oil Company* v. *Temeles*, Essex Superior Court (New Jersey) No. C-2389-55, decided June 27, 1957; *cf. G. D. Searle & Co.* v. *Institutional Drug Distributors, Inc.*, United States District Court for the Southern District of California, Central Division, No. 19884-Y, May 17, 1957, CCH Trade Reg. Rep. Current Decisions, ¶ 68,724.

of the fair trade laws of the Commonwealth of Massachusetts. It can readily be seen that the petitioner does not have the choice of withdrawing from selling to commercial accounts in favor of retail service station dealers like the respondent. Retail service station dealers do not sell in tank-wagon quantities for delivery into storage tanks of commercial accounts, and the only result of such withdrawal would be to lose such accounts to other suppliers at the wholesale level.

It can also readily be appreciated that the holding in this case applies equally to any industry which sells both to retailers and to large consumers. If passage of title becomes the controlling factor, as it clearly has become in this case, as distinguishing a retailer from a wholesaler, an astounding number of transactions traditionally thought of as wholesale find themselves grouped as retail sales. Any industry which sells direct to the federal, state or municipal governments or industrial establishments or hotels, hospitals or charitable or educational institutions will find itself equally barred to fair-trade its products at the retail level. Such purchasers are ultimate consumers to the same extent as the commercial accounts of the petitioner, and are also potential customers of retail establishments. No further demonstration of the economic importance of this decision is necessary. The pattern here demonstrated is the general pattern of distribution in the gasoline industry, which is demonstrated by the pendency of at least three other cases involving the same problem.*

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* *Socony-Mobil Oil Company, Inc.*, v. *North Brighton Service, Inc.*, Suffolk Superior Court (Mass.) Eq. No. 71616; *Socony-Mobil Oil Company, Inc.*, v. *David S. Kornet*, Suffolk Superior Court (Mass.) Eq. No. 71619; *Sun Oil Company* v. *Temeles*, Essex Superior Court (N.J.) No. C-2389-55. In the *Sun Oil* case the issue was squarely put before that court, which arrived at a result directly contrary to that reached by the First Circuit.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5188.

ESSO STANDARD OIL COMPANY,
PLAINTIFF, APPELLANT,

v.

SECATORE'S, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY and HARTIGAN, *Circuit Judges*,
and ALDRICH, *District Judge*.

Robert W. Meserve, with whom *Charles W. Bartlett, John R. Hally, Austin Broadhurst, Nutter, McClennan & Fish* and *Ely, Bartlett, Thompson & Brown* were on brief, for appellant.
Albert U. Rosa for appellee.

OPINION OF THE COURT

May 2, 1957

WOODBURY, *Circuit Judge*. This appeal is from a judgment dismissing a complaint in a suit brought under federal

diversity jurisdiction to enjoin a "non-signer" retailer from selling the plaintiff's Esso and Esso Extra gasolines in Massachusetts for less than the minimum retail prices established therefor in fair-trade agreements entered into by the plaintiff with third party retailers pursuant to the Massachusetts Fair Trade Law, Mass. G. L. c. 93, Sec. 14A-B, quoted in material part in the margin.[1]

The plaintiff, Esso Standard Oil Company is a Delaware corporation engaged in the production, distribution and marketing of gasoline and other petroleum products throughout the United States and in foreign countries. In September, 1953, it entered into a three-year contract to take effect on May 1, 1954, with the defendant, Secatore's, Inc., a Massachusetts corporation operating two large gasoline service stations in East Boston, Massachusetts, whereby it agreed to sell to the defendant and the defendant

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[1] "Section 14A. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment from which said commodity is sold to consumer bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the Commonwealth by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

"Section 14B. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the preceding section, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is hereby declared to constitute unfair competition and to be actionable at the suit of any person damaged thereby."

agreed to buy from the plaintiff, all of the buyer's requirements of Esso and Esso Extra gasolines at the seller's posted tank wagon prices "in effect at the time and place from which delivery is made."

At the time when this contract was made the plaintiff had not entered into any fair trade agreements with anyone in Massachusetts. On August 7 and 8, 1956, however, while its contract with the defendant was in force, the plaintiff negotiated resale price maintenance agreements with several of its retail dealers in Massachusetts fixing minimum retail prices for its Esso and Esso Extra gasolines. The defendant was promptly notified of these agreements and directed to observe the minimum prices therein established. It refused to do so and asserts the right to persist in its refusal unless the court orders it to comply.

It is obvious, and indeed it is freely conceded, that the plaintiff is engaged in interstate commerce. Thus its minimum price fixing agreements with its retailers, even though authorized by state law, are illegal per se under federal antitrust legislation unless exempted therefrom by the Miller-Tydings amendment, 50 Stat. 693 (1937), of sec. 1 of the Sherman Act and the McGuire amendment, 66 Stat. 632 (1952), of sec. 5(a) of the Federal Trade Commission Act.[2] *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 386 (1951); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 310, 311 (1956), and cases cited. The Miller-Tydings amendment, and in almost identical language the McGuire amendment also, provide in material part that nothing in federal antitrust legislation "shall render illegal,

[2] The McGuire amendment not only reaffirmed the policy of the Miller-Tydings amendment, but it also eliminated the restrictive effect of the Supreme Court's decision in the Schwegmann Bros. case by exempting from the antitrust laws minimum price-fixing agreements made binding by state law on "non-signers" of such agreements.

contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions'' under local law. But both amendatory acts provide that the grant of immunity from federal condemnation ''shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.''

The critical, and as we see it the controlling, question before the court below and before us is whether the plaintiff and defendant are ''corporations in competition with each other.''

With its complaint the plaintiff filed a motion for a temporary injunction and the court below held a hearing on the motion. At that hearing the defendant stipulated that practically all of the allegations of fact in the complaint could be accepted as true and made three points in defense. It asserted, first, that the plaintiff's contract with the defendant barred the relief sought, second, that the plaintiff was ''in competition'' with the defendant and its other retailers, and, third, that the plaintiff had been lax in requiring its other retailers to observe its fair trade agreements. On the basis of the evidence introduced at this hearing the court in a carefully prepared opinion rejected all of these defenses and granted the plaintiff the temporary relief for which it asked.

Later on, however, after a hearing on the merits, the court below found on the basis of further evidence that the plaintiff was "in competition" with the defendant and its other retailers. Thus it concluded that the plaintiff's price maintenance agreements were not within the exemption of the Miller-Tydings and McGuire amendments and so were illegal under federal antitrust legislation. Wherefore it vacated forthwith the temporary injunction it had granted and entered the judgment dismissing the plaintiff's complaint which is before us on this appeal.

The plaintiff-appellant not only supplies its gasolines to its retail dealers who in turn sell to ultimate consumers at their filling stations, but it also sells direct to some ultimate customers. It has several hundred so-called "commercial accounts" in Massachusetts, all of whom use a substantial quantity of gasoline per year. These for the most part are operators of fleets of trucks or taxicabs, although some of them also use gasoline for lift-trucks and other off-the-road vehicles. In many cases the plaintiff at its own expense provides, installs and maintains underground tanks and pumps on the respective premises of these customers and it delivers gasoline to them from its bulk plants by tank truck in quantities never less than 300 gallons except in emergency. It charges them one cent per gallon above its posted tank wagon price. There is no set minimum annual consumption required to qualify for a commercial account, but the plaintiff will sell to any such account on which it thinks it can make a profit. Some of these accounts use less than 5,000 gallons annually, but most of them use much more. It actively solicits this type of business and in 1955, the last year for which complete figures were available, it amounted in Massachusetts to over $3,000,000 per year, or about 10% of the appellant's gross local business.

The defendant-appellee also does a substantial annual business at its filling stations with operators of fleets of

motor vehicles. There is no evidence of the dollar volume of this business but in 1955 it had 45 accounts using over 5,000 gallons per year, so it clearly is not inconsiderable. It services these accounts at its filling stations in the customary way that filling stations generally service their customers. That is to say, the fleet operators' trucks or taxicabs are driven to the defendant's station and there the defendant's employees fill the vehicles' tanks and perform the incidental services ordinarily performed by filling station attendants.

Thus, as the District Court found, there is most certainly an area in which the plaintiff and the defendant are in competition with each other. While their competitive techniques are different, one gives less service for a lower price and the other more service for a higher price, the fact remains that each in its own way is striving for the business of supplying gasoline directly to those who operate fleets of motor vehicles. And the area of their competition is not so small that it can be disregarded by application of the de minimis maxim. Nevertheless the plaintiff-appellant contends that its competition with the defendant-appellee does not exclude application of the exculpatory provisions of the Miller-Tydings and McGuire Acts because their competition is not on the same "functional level." It argues that by application of the rule of ejusdem generis the general language of the concluding phrase, "persons, firms, or corporations in competition with each other," is controlled by the preceding reference to six specific categories of competitors, and that therefore the phrase alludes only to retailers, wholesalers etc. who go under another name in commercial jargon, as perhaps "jobbers" or "agents." Alternatively it argues that in context the final phrase refers only to the type of competition which occurs between retailer and retailer or between wholesaler and wholesaler, and so forth, which it asserts is competition in serving the

same "function." In short, by putting stress on "function" the plaintiff-appellant seeks to distinguish competition in rendering the same service from competition for the same customers.

We think these arguments must be rejected on the language and rationale of the Supreme Court in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956). The defendant in that case manufactured a line of drug products which it marketed under its own brand name and it also acted as a wholesaler of its own and other commodities sold in drugstores. It entered into resale price maintenance agreements with respect to its own branded merchandise with other wholesalers of like products and the United States proceeded against it under sec. 4 of the Sherman Act for injunctive relief asserting that the agreements constituted an illegal restraint of trade. McKesson & Robbins contended in defense that it had made the price maintenance agreements in its role of manufacturer and therefore the agreements were not "between wholesalers."

The Supreme Court, refusing to compartmentalize the defendant's business, rejected this defense. It might, perhaps, have rested its decision solely on the proposition that McKesson & Robbins was a wholesaler because it did "wholesale" selling or, alternatively, that it was more a wholesaler than a manufacturer, and hence its price maintenance agreements were "between wholesalers." But it did not so limit its rationale. It said at pages 312-13;

> "Any doubts which might otherwise be raised as to the propriety of considering a manufacturer-wholesaler as a 'wholesaler' are dispelled by the last phrase of the proviso in question, which continues the proscription against price-fixing agreements 'between persons, firms, or corporations in competition with each other.' Congress thus made as plain as words can make it

that, without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other. If they do, the Miller-Tydings and McGuire Acts do not permit them to fix resale prices."

It is true that the Court then went on to say that it had been said in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 389 (1951), that the statutory language " 'expressly continues the prohibitions of the Sherman Act against "horizontal" price fixing by those in competition with each other at the same functional level,' " and followed this with the statement: "Since appellee competes 'at the same functional level' with each of the 94 wholesalers with whom it has price-fixing agreements, the proviso prevents these agreements from falling within the statutory exemption." And on page 315 of its McKesson opinion the Court said that "the language of the proviso in question is unambiguous" and "excludes from the exemption from the per se rule of illegality resale price maintenance contracts between firms competing on the same functional level."

Thus the Supreme Court in the McKesson & Robbins case, as in the Schwegmann Bros. case, made several direct references to competition "on the same functional level." But from reading the opinions in both cases in their entireties we think the Supreme Court in each instance was using the phrase in a descriptive rather than a restrictive sense. The word "functional" itself is not precise in meaning and it does not seem to have any clear significance in either case. In neither case is the word defined and it may well have been used in contradistinction to "categories or labels" to broaden the construction of "competition" beyond that between businesses of the same nomenclature. Indeed, this interpretation is in keeping with the admonition, to be considered more fully later, that the exemption accorded by Congress in the Miller-Tydings and

McGuire Acts from the ban of the Antitrust Acts is to be narrowly construed. As we read the long quotation from the McKesson & Robbins case above, "categories or labels" are not the "crucial inquiry." What is determinative is "whether the contracting parties compete with each other." The parties before us on this appeal, as we have shown, are in a real sense competing with each other for the business of a not insubstantial class or type of consumers of gasoline. Although their techniques of doing business differ, they are nonetheless competitors, and th excludes application of the exemption from antitrust legislation.

In short, we think the Antitrust Acts are not so much concerned with the preservation of competition in performing given functions as such as they are with preserving to consumers the benefits which result from competition between different businesses to serve a particular consumer need. And we do not think that Congress in the Miller-Tydings and McGuire Acts intended to limit or restrict full achievement of that major concern.

But the appellant contends that even though there is competition between the parties to a limited extent, nevertheless it is entitled to injunctive relief as to the separate class of business for which it and the defendant do not actually or potentially compete. That is to say, it contends that it is entitled to enforce resale price maintenance with respect to that separable portion of the defendant's trade as to which it does not compete, *i.e.* ordinary retail sales in relatively small amounts to the ordinary run of motorists.

The appellant did not make this suggestion in the court below. Thus there may well be unexplored practical difficulties, if not difficulties under local statutes, which would render it inexpedient to grant the partial relief asked for. This does not prevent us from considering the suggestion, however, for we could remand for further hearing. But we

shall not take that course for we do not think the statute permits the partial relief requested.

No authority is cited for a grant of limited relief, and the possibility of granting such relief is not mentioned in any case which has come to our attention. Nevertheless, it can be said that the Miller-Tydings and McGuire amendments do not specifically forbid it, and in the many situations in which wholesalers and retailers in general are in competition for large accounts, to allow partial relief of the sort requested would effectuate the avowed purpose of the amendment to permit price maintenance as to trade marked or brand named goods in order to prevent destructive cutthroat competition and to cure the evils attendant upon the use by some retailers of "loss leaders." We cannot accept the argument, however, in view of the strictness with which the amendments were construed in the Schwegmann Bros. case, and also in the McKesson & Robbins case, wherein at the conclusion of the Court's opinion on page 316 it is said: "Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." Our conclusion, therefore, is that any competition for customers is an absolute bar to price maintenance agreements between the competitors.

This conclusion renders unnecessary any consideration of the other defenses raised below and of the additional defense suggested on this appeal that gasoline cannot be fair traded under the Miller-Tydings and McGuire Acts because it is not "a commodity which bears, or the label or container of which bears, the trademark, brand, or name" of its producer.

A judgment will be entered affirming the judgment of the District Court.

ALDRICH, *District Judge,* (concurring).

It seems to me that the McGuire Act is a very practical act. It does not, contrary to appellant's argument, exempt from permissible fair trade agreements contracts between "producers, wholesalers, brokers, factors, retailers, or other persons in competition with each other," which might call for the application of the rule of ejusdem generis to limit competition to so-called horizontal levels, but reads "persons," not "other persons." Hence it withholds approval of agreements, express or by operation of law, between all competitors. If there were doubt of this interpretation the history and purpose of the Sherman Act, and the fact that McGuire's intent is to carve limited exceptions thereto, would supply the answer. True, since most competition is on horizontal levels, courts in particular cases may naturally fall into the use of that terminology. But, as appellant suggests as to the Sherman Act, quoting from *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, at 615, ". . . the Act deals with competitive realities, not words." If bona fide competition exists here, I see no basis for restricting the language of the statute.

Competition has many meanings. In a sense the movie house and the television retailer are in competition with each other for the "amusement dollar." But here the essential commodity, gasoline, is the same. The servicing, etc., may be only the fringe. If owners of fleets of trucks or taxicabs may be influenced in their choice of purchasing gasoline from appellant or appellee by the question of price, I believe the latter are "persons . . . in competition with each other" within the Act. I cannot say that the finding below that they are is plainly wrong.

However, I am not happy with that portion of the majority opinion which states that as matter of law an injunction may not issue as to that portion of appellee's business which does not compete with appellant. Since appellee has

prevailed upon realities, I do not see how one must ignore a reality that to a substantial extent the parties may not compete at all. This is not a case of either enforcing, or striking down, some particular agreement, depending upon its nature. If appellee is involved in two separable activities, I believe it an over-simplification to say that because in one it is a "person in competition," it is as to the other. If appellant manufactured gasoline and toothpaste, fair-traded both, and sold one in competition with appellee, but not the other, would injunctive relief be denied as to both?

So far as *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, may be thought to suggest the contrary, I would distinguish it on the ground that here we are involved with a non-signer whose obligations depend upon his activities, now made coverable by McGuire. However, the precise nature of these activities, and the important considerations leading to a determination as to their separability, present issues of fact which were not presented to the District Court, because this contention was not there advanced. Since my brethren do not accept the principle it is not important for me to decide whether I would remand the case for further consideration, or whether, which is possible, I would say that the matter not having been presented below, it is too late to raise it here. Likewise, it is equally unnecessary, under the circumstances, for me to reach the question of labeling, which would have to be decided before the case would be sent back, I am, accordingly, content to concur in the judgment of affirmance, subject to the above reservations.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5188.

ESSO STANDARD OIL COMPANY,
PLAINTIFF, APPELLANT,
v.
SECATORE'S, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY and HARTIGAN, *Circuit Judges*, and ALDRICH, *District Judge*.

Robert W. Meserve, with whom *Charles W. Bartlett, John R Hally, Austin Broadhurst, Nutter, McClennan & Fish* and *Ely, Bartlett, Thompson & Brown* were on brief, for appellant.
Albert U. Rosa for appellee.

OPINION OF THE COURT

ON PETITION FOR REHEARING.

June 14, 1957.

WOODBURY, *Circuit Judge*. In the majority opinion of the court and also in Judge Aldrich's concurring opinion it is stated in substance that the plaintiff-appellant did

not ask the court below for injunctive relief limited to the separate class of business for which it and the defendant-appellee were not in either actual or potential competition. On this petition for rehearing the plaintiff-appellant asserts that actually it did ask the court below for such limited relief and that the court denied it, and it points to the typewritten transcript to prove its assertion. For relief it asks us to amend our opinions to conform to the fact thus established and for leave to add to the record appendix to its brief by printing as a supplement thereto the portions of the typewritten record on which it relies.

Our Rule 24(1) permitting appellants to proceed on record appendices to their briefs requires that relevant docket entries, the charge or judgment below, and certain other matters, be printed therein, and also "such other parts of the record, material to the questions presented, as the appellant or petitioner deems it essential for the judges of the court to read in order to decide those questions." Certainly whether the plaintiff-appellant asked the District Court for the limited injunctive relief which is asserted on appeal it was entitled to is material. This plaintiff-appellant should, therefore, have printed in its original appendix the matter which it now asks for leave to print in a supplement. While we are free if we wish to scan the original record made in the court below, we are not under any obligation to thumb through that often voluminous record to see whether an appellant has failed to print in the appendix to his brief some part of it material to the questions he presents to us on appeal. Were that our duty the appendix system would have little or no point. It is the appellant's duty to print in his appendix the parts of the record essential for us to read in order to decide the questions he presents, and if he fails to do so, he runs the risk of coming before this court on an inadequate record on appeal.

However, we are disposed to be lenient in this particular case, for even though we did not accord controlling significance to the appellant's failure to ask the court below for limited injunctive relief, which we assumed from the record appendix to its brief to be the fact, we nevertheless see no reason why the relief for which it asks in this petition for rehearing should not be granted to the end that the actual fact may appear on the records of this court.

Leave is granted to the plaintiff-appellant to file a supplemental record appendix to its brief in the form submitted with its petition for rehearing, and an order will be entered denying the petition for rehearing.

ALDRICH, *District Judge,* (concurring)

I concur in Judge Woodbury's opinion on rehearing. However, now that it appears that appellant did raise the matter of partial injunctive relief below, I feel I must face up more squarely to that issue. Upon further consideration my prior concurring opinion is now withdrawn in toto, and the following observations substituted.

I do not quarrel with the view that the parties are "persons in competition with each other." The McGuire Act does not, contrary to appellant's argument, exempt from permissible fair trade agreements contracts between "producers, wholesalers, brokers, factors, retailers, or other persons in competition with each other," which might call for the application of the rule of *ejusdem generis* to limit competition to so-called horizontal levels, but reads "persons," not "other persons." Hence it withholds approval of agreements, express or by operation of law, between all competitors. If there were doubt of this interpretation the history and purpose of the Sherman Act, and the fact that McGuire's intent is to carve limited exceptions thereto, would supply the answer. True, since most competition is on horizontal levels, courts in particular cases may

naturally fall into the use of that terminology. But, as appellant suggests as to the Sherman Act, quoting from *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, at 615, ". . . the Act deals with competitive realities, not words." If bona fide competition exists here, I see no basis for restricting the language of the statute.

Competition has many meanings. In a sense the movie house and the television retailer are in competition with each other for the "amusement dollar." But here the essential commodity, gasoline, is the same. The servicing, etc., may be only the fringe. If owners of fleets of trucks or taxi-cabs may be influenced in their choice of purchasing gasoline from appellant or appellee by the question of price, I believe the latter are "persons . . . in competition with each other" within the Act. I can not say that the finding below that they are is plainly wrong. But if the parties are thus persons in competition it is because of appellee's unusual activities distinguishing it from other retailers whose business is less extensive. If those activities are truly severable, it seems arguable that the bar to appellant's injunction should be equally so. If appellant manufactured, and fair-traded, both gasoline and toothpaste, and appellee sold both, but the parties were actually in competition only as to the former, I could not say they were persons in competition as to both.

However, I suggest appellant's rights here are lost not because of appellee's special activities which made them persons in competition, but because its own activities made it a retailer. Agreements between retailers are not protected. The statute supplies no definition of retailer. The dictionary supplies two: one who sells in small quantities, and one who sells to the ultimate consumer. Of these the latter seems the more in keeping with the concept of the Fair Trade acts. It clearly covers appellant's "commercial accounts."

Either competition or retailing would result in the denial of complete relief to appellant, but the second must be fatal to even partial relief. It would be one thing to say that with respect to separable activities as to which the parties were not competing they were not "persons in competition with each other." It would be quite another to say that if appellant is to be classed as a retailer it can escape the force of the Act, even in part, by showing it is something additional. Price-fixing agreements between retailers are invalid per se, irrespective of the area of competition. On this basis there could be no possible issue of partial relief.

Appendix B.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Opinion.

November 21, 1956

Wyzanski, D. J.

This is a diversity jurisdiction suit to enjoin a non-signer from selling in Massachusetts at retail plaintiff's products *Esso* and *Esso Extra* at prices less than the minimum retail prices established by fair trade agreements plaintiff has made with third parties pursuant to the Massachusetts Fair Trade Law. On an application for a temporary injunction, this Court took evidence, wrote an opinion dated October 3, 1956, and granted the preliminary relief October 5.

Further evidence was offered November 16 and 21 at a hearing on a permanent injunction. At that time it was stipulated that the transactions of plaintiff were in interstate commerce. From Exhibit 2 it appeared that the plaintiff's 1955 sales to commercial accounts in Massachusetts were as follows:

(a) Total dollar volume of commercial accounts in 1955: $3,345,702.28

(b) Total dollar volume of sales to commercial accounts using less than 5,000 gallons per year: $77,561.00

(c) Total dollar volume of commercial accounts using between 5,000 and 10,000 gallons per year: $161,881.48

(d) Total dollar volume of commercial accounts using between 10,000 and 15,000 gallons per year: $167,285.13

(e) Total dollar volume of commercial accounts using

between 15,000 and 20,000 gallons per year: $119,410.76

(f) Total dollar volume of commercial accounts using between 20,000 and 25,000 gallons per year: $71,851.25

(g) Total dollar volume of commercial accounts using between 20,000 and 30,000 gallons per year: $120,735.37

(h) Total dollar volume of commercial accounts using between 30,000 and 40,000 gallons per year: $115,991.30

(i) Total dollar volume of commercial accounts using between 40,000 and 50,000 gallons per year: $166,966.58

(j) Total dollar volume of commercial accounts using between 50,000 and 75,000 gallons per year: $234,711.43

(k) Total dollar volume of commercial accounts using between 75,000 and 100,000 gallons per year: $142,394.77

(l) Total dollar volume of commercial accounts using in excess of 100,000 gallons per year: $1,966,913.21

(All of the above dollar figures include Federal and State taxes of 7¢ per gallon.)

It thereafter appeared that the two retail gasoline stations operated by defendant sold in 1955 to 11 accounts 5,000-10,000 gallons each, to 9 accounts 10,000-20,000 each, to 17 accounts, 20,000-30,000 each, and to 8 accounts 30,000-40,000 gallons each. It seems to the Court plain that as to these 45 accounts plaintiff and defendant are in potential competition. Indeed if defendant is held to observe minimum prices fixed by plaintiff, some of defendant's 45 customers are almost sure to become commercial accounts of plaintiff for thus they would get a lower rate without losing much in the way of service or convenience.

Defendant's situation is not shown to be markedly different from that of many other of the more than 500 Esso gasoline service stations in Massachusetts. And the Court, therefore, finds that an unknown number of other retail

gasoline service stations compete with plaintiff in reaching accounts of over 5,000 gallons annually.

From the foregoing facts I conclude that as a matter of law plaintiff is barred by §1 of the Sherman Act, 15 U. S. C. §1 from making or enforcing its re-sale price maintenance agreement against defendant.

The agreement admittedly is a restraint of trade unless it is specifically exempt by the provisos of the Miller-Tydings Act or the McGuire Act. 50 Stat. 693, 66 Stat. 632. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305.

These provisos are not operative because the exemption conferred by them is not available "between persons . . . in competition with each other." Competition, as there used, is not confined to a situation where the producer or distributor performs the same function, or makes the same type of offers, or combines in one package the same incidental benefits as the person with whom he is said to be in competition. The statute precludes agreements between those who in fact are competitors for the same business, no matter how different their approach.

If the statute is not read in this broad way, it would follow that through the use of a so-called fair trade agreement this plaintiff would be at liberty by setting a high resale price for retail gasoline service stations to drive all their large customers into abandoning the retail outlets and securing gasoline directly from plaintiff. To assume that Congress left the door open to such potential abuse is to ignore the history and the policy as well as the language of the Sherman Act, the Miller-Tydings Act, and the McGuire Act.

The temporary injunction is vacated forthwith and plaintiff's complaint is dismissed on the merits, effective today.

WYZANSKI
United States District Judge

Appendix C.

McGuire Fair Trade Amendment.

Act of July 14, 1952, 66 Stat. 631.
15 U.S.C. § 45 (a).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

Sec. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

"Sec. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to

intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate

commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."